Case No. 08-585

IN THE SUPREME COURT
OF THE UNITED STATES

STATE OF OHIO,
Petitioner,

vs.

DAVID E. WADE.
Respondent.

On Petition for Writ of Certiorari to the
Ohio Court of Appeals for the Tenth District

Brief of Respondent in Opposition to Petition for Certiorari

Eric J. Allen (0073384)
The Law Office of Eric J. Allen, Ltd.
713 South Front Street
Columbus, OH 43206
(614) 443-4840
eric@allenlawoffice.com
Counsel of Record
Counsel for Respondent David E. Wade

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE DOCTRINE OF COLLATERAL ESTOPPEL LIMIT OR BAR THE STATE FROM INTRODUCING EVIDENCE OF ACQUITTED CONDUCT AT SUBSEQUENT TRIAL?

II. DOES THE STATE BEAR THE BURDEN OF DEMONSTRATING THAT THE ACQUITTAL AT THE PREVIOUS TRIAL WAS DEPENDENT ON A FACTOR OTHER THAN THAT THE JURY FOUND THAT THE DEFENDANT DID NOT POSSESS A FIREARM DURING THE INCIDENT IN QUESTION?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS AND CASE 1

REASONS FOR DENYING THE WRIT 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Ashe v. Swenson, 397 U.S. 430 (1970) 4, 7

Dowling v. United States, 493 U.S. 342 (1990). 2, 4, 8

Rice v. Marshall, 816 F.2d 1126 (6th Cir. 1987) 4

Rosetti v. Curran, 891 F.Supp. 36 (D. Mass., 1995) 7

Schiro v. Farley, 510 U.S. 222 (1994) 4

United States v. Frazier, 880 F.2d 878 (6th Cir. 1989) 4

CONSTITUTIONAL PROVISIONS

Fifth Amendment ..... passim

Fourteenth Amendment ..... passim

STATEMENT OF THE CASE AND FACTS

This case involves the second trial of David Wade who was originally charged with eight offenses including rape, kidnapping, theft, and aggravated burglary. Each offense carried a specification that the offense was committed while Wade possessed a firearm. In the first trial, the jury found Wade not guilty of all of the firearm specifications and the one count of aggravated robbery alleging that he had committed the robbery while possessing a firearm. The jury found Wade guilty of all additional offenses. On his first appeal, the remaining convictions were reversed on unrelated issues.

At his re-trial Wade moved to limit the state's introduction of any evidence demonstrating that he possessed a gun during this incident because he had been acquitted of possessing a gun during the incident at the first trial. The trial court considered the law of collateral estoppel, but overruled Wade's motion and permitted the state to introduce evidence that he possessed a gun during this incident - despite the earlier acquittal. The trial court, likewise, refused to give the jury a limiting instruction on the jury's use of this evidence despite Wade's request. Wade was again convicted of the remaining counts.

On his appeal of this second set of convictions, the Court of Appeals analyzed the law on collateral estoppel before concluding that the trial court

properly admitted the gun evidence. The Court of Appeals further concluded that the trial court should have given the limiting instruction on the use of this evidence requested by Wade, The Ohio Court of Appeals reversed Wade's convictions on all counts.

The Court of Appeals applied clear precedent requiring a limiting instruction in this situation where Wade had been acquitted of possessing a firearm during an earlier trial on the same incident. See, *Dowling v. United States*, 493 U.S. 342, 347 (1990) ("Especially *in light of the limiting instruction provided by the trial judge,* we cannot find introduction of [evidence of the prior acquitted conduct erroneous.]" *Id* at 353.)

Critically, the Court of Appeals reached its holding based on a unique factual scenario that is highly unlikely to reoccur and that carries no great federal constitutional import. The facts here more likely resemble a law school exam question than an issue that requires the intervention of this Court. This case concerns a retrial of charges arising out of one incident where Wade had been acquitted of possessing a firearm during the incident at the first trial. The State of Ohio recognized that Wade could not be retried on the acquitted charges, but nevertheless insisted on presenting evidence that he had possessed a firearm during the incident at the second trial. Now, the state

speculates that the original jury may have only concluded that the weapon was not operable, so that evidence that he had the gun was admissible. The operability of the firearm has never been an issue at either trial. The trial court at the second trial *permitted* the introduction of evidence that Wade possessed a firearm during the incident and refused to give a limiting instruction.

The Court of Appeals in the second appeal, after a lengthy discussion of the doctrine of collateral estoppel, found no error in the trial court's admission of the gun evidence but found that a limiting instruction was required.[1]

REASONS FOR DENYING THE WRIT

I COLLATERAL ESTOPPEL LIMITS OR BARS THE STATE FROM INTRODUCING EVIDENCE OF ACQUITTED CONDUCT AT SUBSEQUENT TRIAL. 5th and 14th AMENDMENTS.

---

[1] The Court of Appeals released a second decision granting the State of Ohio's Application for Reconsideration ordering a new trial only on the counts of rape and aggravated burglary but upholding the conviction and sentences on the other counts. The Court of Appeals concluded that Wade had only requested a limiting instruction on those charges.

II. THE STATE BEARS THE BURDEN TO DEMONSTRATING THAT EVIDENCE OF ACQUITTED CONDUCT IS ADMISSIBLE AT A SUBSEQUENT TRIAL. 5th and 14th AMENDMENTS.

Petitioner State of Ohio bases its argument on the proposition that the doctrine of collateral estoppel never bars the admission of evidence. The State of Ohio further appears to argue that in order for the doctrine of collateral estoppel to bar introduction of such evidence in subsequent trial, the defendant bears the impossible burden of proving that the acquitted conduct was necessarily decided in his favor at the previous trial. The state's premise is clearly erroneous and ignores the convoluted facts of this case as well as this Court's precedent on double jeopardy and collateral estoppel.

Stated most simply, collateral estoppel under the 5th and 14 Amendments is "the principle that bars relitigation between the same parties of issues actually determined at a previous trial...." *Ashe v. Swenson,* 397 U.S. 436, 442 (1970). It "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443; *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Dowling v. United States*, 493 U.S. 342, at 347 (1990).

Thus, the collateral estoppel doctrine prohibits the Government from

relitigating an issue of ultimate fact that has been previously determined by a valid and final judgment. Collateral estoppel can result either in prohibiting the introduction of particular evidence in a subsequent trial, see *Rice v. Marshall*, 816 F.2d 1126 (6th Cir. 1987) or in precluding a subsequent prosecution. *Ashe v. Swenson*, *supra*; *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989). As recognized by the Ohio Court of Appeals, the doctrine does not necessarily bar the use of evidence in all circumstances simply because it relates to alleged criminal conduct for which a defendant has been acquitted. *Dowling v. United States*, 493 U.S. at 350.

However, the Ohio Court of Appeals concluded here that the prior acquittal on all of the charged firearm specifications and the aggravated robbery charge arising out of the same incident *necessarily* arose out of a jury finding that the state had not proven that Wade had a gun in his possession during this incident. The Court of Appeals based its decision in part on the fact that the jury had been instructed it must find that Wade *possessed* a deadly weapon to find the defendant guilty of aggravated robbery. Given that instruction, the Ohio Court of Appeals concluded that the original jury acquitted Wade of all charges and specifications that required a finding the he *possessed* a gun. There is no clear and convincing evidence in the record to

demonstrate that the jury concluded otherwise.

Nevertheless, the State of Ohio now *speculates* that the jury *may have* instead found that the State of Ohio had not proven that the gun was operable rather than that the state had not proven that Wade *possessed* a gun. The operability of the firearm was never an issue at the first trial or anytime thereafter. Based on this unsupported speculation (contrary to the conclusions of the Court of Appeals), the State of Ohio continues to argue that because the jury *could have concluded* that the gun was inoperable that it was free to introduce evidence that Wade *possessed* a gun and that he used the gun to threaten the victim. ("In the absence of evidence that the respondent actually fired the weapon or that the weapon was recovered and tested, the first jury rationally could have concluded that the respondent in fact had possessed a gun but that there was a doubt about the "deadly" and "operable" nature of the gun." Petition at 22) The state further argues that because the jury could have concluded that the firearm was inoperable in the first trial, no limitations should have been placed on the jury's consideration of this evidence once it was introduced at the second trial.

The state's argument is purely speculative and is contrary to the evidence. The state's argument was properly rejected by the Ohio Court of

Appeals.

At the first trial, the jury submitted a question about the necessity of finding that Wade *possessed* a gun in order to find Wade guilty of aggravated robbery. The question was answered in the affirmative. This jury question and the trial court's response - as well as the fact that there was no evidence or argument regarding the non-operability of the firearm during the first trial - conclusively demonstrates that the original jury found that Wade did not possess a gun during the incident. The Ohio Court of Appeals' conclusion that the first jury necessarily found that the state had not proven beyond a reasonable doubt that Wade possessed a gun during this incident is supported by the record. The State of Ohio has presented no evidence demonstrating that this conclusion is incorrect. The State of Ohio's argument is based on pure speculation.

Thus the conclusions of the Ohio courts that if this evidence was admissible at the second trial at all, a limiting instruction was required, is not of substatantial constitutional significance requiring the intervention of this Court. Further, Petitioner State of Ohio's argument – based as it is on speculation about what the original jury concluded – demonstrates the unique nature of the issue here and demonstrates that it is not a subject worthy of this Court's

review.[2]

The Court of Appeals concluded that the evidence that Wade used a gun to intimidate the victim was admissible in the second trial because it did not involve an ultimate fact that had previously determined and because it was inextricably related to other evidence that Wade had committed these offenses. The state thus had a right to present that evidence. Nevertheless, the Court of Appeals properly recognized that the evidence that Wade possessed a gun may have been mistakenly used by the jury to determine the element of force in the rape count because the trial court had failed to give a proper limiting instruction. The Court of Appeals further found on reconsideration that because the rape charge was the basis for the aggravated burglary charge, a limiting instruction was required on that charge also.

2

At the second trial, in arguing the admissibility of this evidence, the state conceded that the record from the first trial clearly indicated that the jury concluded that Wade did not possess a gun: ". . . the jury left clear footprints as to the fact that they did in fact consider whether or not the defendant had a gun and they decided that he was not guilty of that, and I think that is pretty clear . . ." Transcript March 13, 2007 at 21-22.

Respondent State of Ohio nevertheless erroneously argues that the Court of Appeals relied solely on a disapproved decision, *Rosetti v. Curran*, 891 F.Supp. 36, (D. Mass., 1995). In fact, the Court of Appeals cited *Rosetti*, but relied on *Ashe v. Swenson*, the leading case from this Court. See, Opinion at 13.

The Court of Appeals followed the very procedure approved by this Court in *Dowling v. United States*, 493 U.S. 342 (1990). In *Dowling*, the trial court instructed the jury that the defendant had been acquitted of the conduct, emphasized the limited purpose for which evidence of the acquitted conduct was admitted and reiterated that limitation in the final charge. *Dowling*, 493 U.S. at 346. This Court relied on the limiting instruction as a reason for permitting the introduction of evidence of the prior acquitted conduct: "[e]specially in light of the limiting instruction provided by the trial judge, we cannot find introduction of [evidence of the prior acquitted erroneous.]" *Dowling* at 353.

The Court of Appeals recognized and applied the law on collateral estoppel permitting the evidence of gun possession to be admitted but requiring its use by the jury to be limited with a proper instruction. The decision is consistent with this Court's precedent. The state has failed to

demonstrate any reason for this Court to review the decision of the Court of Appeals.

CONCLUSION

The Petitioner State of Ohio has presented no issue of major constitutional substance and no issue that is in conflict throughout the country. The requirement of a proper limiting instruction when evidence of acquitted conduct is introduced in a subsequent trial is clearly set forth in numerous cases. Moreover, this is a uniquely fact-intensive issue which only affects the parties in a twice reversed case.

This Court should deny the State of Ohio's Petition for Certiorari.

Respectfully submitted,

Eric J. Allen (0073384)
The Law Office of Eric J. Allen, Ltd.
713 South Front Street
Columbus, OH 43206
(614) 443-4840
eric@allenlawoffice.com
Counsel of Record